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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES WARE,

Defendant and Appellant.

B287995

(Los Angeles County  
Super. Ct. No. PA083082)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed and remanded with directions.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, William H. Shin and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Following a guilty verdict on a criminal threats charge, the trial court initially sentenced defendant and appellant James Ware, Jr., (defendant) to 35 years to life in prison—comprised of a 25-years-to-life Three Strikes sentence for the conviction plus ten years under Penal Code section 667, subdivision (a)(1) for sustaining two prior serious felony convictions.<sup>1</sup> In a prior appeal, we reversed that judgment for instructional error and gave the People the option of retrying the case or accepting a reduction of the conviction to attempted criminal threats. (*People v. Ware* (May 30, 2017, B271291) [nonpub. opn.].) The People elected the latter alternative and the trial court resentenced defendant, denying his *Romero*<sup>2</sup> motion and imposing the same 35-years-to-life sentence. We consider whether the trial court abused its discretion in denying the *Romero* motion, which argued defendant fell outside the spirit of the Three Strikes sentencing scheme because the qualifying strike crimes were too remote and the ultimate sentence imposed was too harsh. We also decide whether a remand is warranted in light of a recent change in law giving the trial court additional sentencing discretion.

I  
A

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<sup>1</sup> Undesignated statutory references that follow are to the Penal Code.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

In February 2015, defendant's mother and his brother, Rick, spoke to defendant by phone; the call was recorded. Defendant said he wanted to come over to the house so he could eat, take his diabetes medication, and shower. Rick refused to give defendant permission to enter the house and reminded defendant he would "assault everybody" whenever he came over. Defendant then began arguing with Rick, and Rick repeatedly told defendant he should get counseling or enter a treatment program to address his substance abuse and mental health issues. Defendant eventually hung up on Rick.

When defendant called Rick back, defendant said he was "so mad" and "really want[ed] that house to burn down." Defendant told Rick: "I got a Molotov cocktail right here. I've got a lighter in my hand, Ricky. And—and I—I got a great big old 40-ounce bottle full of gas, and I'm going to burn your house down, man." Then, over the next ten-plus minutes, defendant repeatedly threatened Rick and the other occupants of the house, stating at one point: "I hate you so much that I could really trap with you [*sic*] motherfuckers in there right now and burn that house down. That's how I'm feeling right now. You know what I mean? But you want to talk to me about a fucking [counseling] program? [¶] . . . [¶] I'm tired of this motherfucking shit. I'm tired. You think I'm going to—the next time I go to jail, I just want you motherfuckers to know, yeah, I deserve that. So whatever life sentence I get or whoever die[s], whatever happen[s], man, you all—you all brought this shit on yourself, man, you know? [¶] . . . [¶] I want you dead, man. I want your mama dead and your fucking daughter, man, and I'm going to kill you motherfuckers . . . ." Rick did not respond to defendant's

threats other than to reiterate defendant should enroll in a counseling program.

Rick called 911 after talking to defendant. Rick told the 911 operator his mother asked him to call because defendant had come to the house and damaged a door while trying to break in. Rick's mother, who also spoke to the 911 operator during the call, explained defendant broke the door frame but couldn't get the door all the way open. In response to the operator's questions, Rick said defendant was still trying to get in the house and he thought defendant was on drugs.

Rick called 911 again approximately ten minutes later. He told the operator he thought defendant "just poured gasoline all over, [and] he's trying to burn the house down." The operator asked, "And you said he put gas all over the house?" Rick responded, "Y[eah], we have a tape of the thing. And he did it. And he burst the door down trying to get in." Rick then said, "It really smells like gas, or something in here. But we can't go out because he's out there. Yea[h], he's coming back and forth across the street from the neighbors house, they're also . . . felons."

Rick told police officers who responded to the 911 call that defendant broke the door and tried to get in the house. One of the officers examined the house's side door and found the jamb had been cracked in a way consistent with someone hitting or kicking the door. During their inspection of the property, the officers could smell gasoline when standing in the area of the home's side door and front door, and a piece of carpet in front of one of the doorways later tested positive for the presence of gasoline.

The responding officers took defendant into custody, and during a search of his person, found a lighter in his front pocket.

## B

When convicting defendant on the criminal threats charge, the jury found true allegations that defendant suffered three prior serious or violent felony convictions (§§ 667, subds. (b)-(i), 1170.12) in 1992, one for voluntary manslaughter and two for assault with a deadly weapon (both of which were sustained in the same criminal proceeding). Following our prior decision reversing the judgment and remanding for resentencing (if the People accepted a reduction of the conviction to attempted criminal threats, which they did), defendant filed additional sentencing submissions, including a request that the trial court strike the “strike” allegations the jury found true.

The defense noted it had filed a *Romero* motion in connection with the original sentencing hearing. That motion argued defendant fell outside the spirit of the Three Strikes law because his prior strike crimes were by then 23 years old (both convictions were sustained in 1992), because defendant suffered from “medical issues related to diabetes, mental illness and drug problems,” and because defendant’s conviction for threatening his mother and Rick “did not result in any actual harm to anyone.” For purposes of resentencing following remand, defendant renewed his *Romero* motion and asked the court to impose a probationary or time-served sentence if it agreed to strike his prior strike crimes.

The People opposed defendant’s renewed *Romero* motion, incorporating the arguments made in their opposition to the originally-filed motion. As to the nature and circumstances of the current threats crime, the People emphasized the graphic threats defendant made and the fact that gasoline had been poured

outside the door of defendant's mother's home. The People argued the crime was not an "isolated incident" because defendant had been convicted earlier in 2002 of possession of a device for arson (§ 453, subd. (a))—an offense in which, according to the People, defendant "similarly went to his mother's home, threatened to burn and kill his mother, and poured gasoline."

The People's *Romero* opposition also reviewed the entirety of defendant's criminal history, including the prior strike crimes the jury found true. Defendant sustained the prior strike convictions in 1992, one for voluntary manslaughter where defendant personally shot and killed the victim, and two convictions for assault with a deadly weapon (corresponding to two separate victims). The People also detailed over fourteen instances since the prior strike convictions when defendant had been convicted, arrested, or violated his parole or probation. The convictions cited by the People included a 1995 conviction for assault likely to cause great bodily injury (§ 245, subd. (a)(1)), a 1999 conviction for battery (§ 242), the aforementioned 2002 conviction for possession of a device for arson, 2003 convictions for battery on a peace officer (§ 243, subd. (c)(2)) and obstructing an executive officer (§ 69), and a 2004 conviction for being a prisoner in possession of a deadly weapon (§ 4502, subd. (a)).

The People's opposition also recounted a statement from defendant's assigned probation officer. The probation officer stated defendant had not been compliant with parole conditions, had numerous parole violations (including going to his mother's house when told not to go there), refused to participate in mental health counseling, failed to participate in a "batterer's program," and failed to drug test. The probation officer opined defendant was "unstable" and "definitely poses a danger to his mother."

At the resentencing hearing, the trial court indicated it reviewed and considered all of the sentencing submissions filed by the parties and the report prepared by the probation office. The court also permitted the defense to call defendant's mother and Rick as witnesses; both testified they love defendant, did not take his threats seriously, did not fear defendant, and did not want to see him sent to prison. The trial court denied the defense *Romero* motion, explaining that "just looking at all the prior convictions, [the] serious nature of the prior convictions, [the] serious nature of the current offense and all those factors that I'm to consider under *Romero*," defendant could not be deemed outside the spirit of the Three Strikes sentencing scheme, in whole or in part. The trial court imposed the same 35-years-to-life prison sentence it had originally imposed, and 10 years of the 35-year component of the sentence were attributable to prior serious felony conviction enhancements (§ 667, subd. (a)(1)) that were mandatory at the time of resentencing.

## II

When deciding whether to strike a prior conviction pursuant to *Romero*, a trial court must consider whether the defendant falls outside the "spirit" of the Three Strikes sentencing scheme by looking to the nature and circumstances of the present offense of conviction; the nature and circumstances of prior serious or violent felony convictions; and the particulars of the defendant's background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) "[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if

we might have ruled differently in the first instance’ [citation].” (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*)). That is the state of the record in this case, and reversal of the trial court’s *Romero* ruling is therefore unwarranted. But the Attorney General and defendant agree a remand is required so that the trial court may consider whether to exercise recently granted discretion to strike defendant’s five-year prior serious felony conviction enhancements. The parties are correct in that assessment, and we remand the matter for that limited purpose.

#### A

Under section 1385, subdivision (a), and in furtherance of justice, a trial court may strike or dismiss an allegation under the Three Strikes law that a defendant has previously been convicted of a serious or violent felony. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) We review a trial court’s decision to refrain from dismissing a prior felony conviction allegation under section 1385 for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) Defendant bears the burden of establishing the trial court’s decision was irrational or arbitrary; that reasonable minds might differ is not enough. (*Id.* at pp. 375-378.) Absent such a showing, we presume the trial court acted to achieve lawful sentencing objectives. (*Id.* at pp. 376-377.)

The record demonstrates the trial court balanced the relevant facts and reached an impartial decision; this is not a case where, for example, the trial court was unaware of its discretion to strike defendant’s prior strike convictions or where the court considered impermissible factors in arriving at its decision. (*Carmony, supra*, 33 Cal.4th at p. 378.) Defendant nevertheless believes the trial court’s refusal to strike any of his



prior strike crimes was irrational because those crimes were remote (occurring in 1992, some 23 years before the attempted criminal threats here) and because of his young age (19) at the time of those crimes (a point defense counsel did not urge in the trial court). But these considerations must be balanced against the nature of the prior strike crimes—which were quite serious, including one in which defendant shot and killed a victim. The age of the prior strike crimes must also be balanced against defendant’s criminal conduct in the interim, which is fairly characterized as extensive and demonstrates defendant “did not refrain from criminal activity during that span of time[ ] and . . . did not add maturity to age.”<sup>3</sup> (*Williams, supra*, 17 Cal.4th at p. 163 [holding *Romero* relief unavailable for a defendant who was 20 years old at the time of the prior strike crimes and 32 years old at the time of the felony triggering the Three Strikes sentence].) Indeed, on this score, it is telling that in committing the current attempted criminal threat offense at age 43, defendant appeared to brag about his prior voluntary manslaughter crime, warning Rick during one of the threatening phone calls that “what you don’t know . . . is I killed somebody right, and I had gotten mad and I got mad, I got very angry and shit got out of control . . . .”

Defendant also asserts the attempted criminal threats were not truly “serious” because no one was injured and defendant’s mother and Rick testified they did not want defendant to go to prison. The points are unpersuasive. Given the evidence of

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<sup>3</sup> During one of the recorded threatening phone calls, even Rick told defendant he had been “going to jail for 20 years back and forth, back and forth revolving door.”

poured gasoline and a partially kicked in door, along with defendant's criminal history and the opinion expressed by defendant's assigned probation officer, there is good reason to think actual harm to anyone was instead averted by the 911 calls, not real reticence on defendant's part to refrain from carrying out his threats. As for the testimony from defendant's mother and Rick, it is inconsistent in places with other evidence in the record, and in any event, it is not dispositive of the seriousness of defendant's crime.

Defendant also suggests the trial court's *Romero* ruling must be reversed because defendant has mental health problems and abuses cocaine and methamphetamine. Defendant's mental health defense at trial was rejected by jury, and the trial court could reasonably reject its relevance or persuasiveness for purposes of its own *Romero* determination. We also disagree that defendant's continued drug use, if it played any role in the offense at all, was a mitigating factor.<sup>4</sup>

A 35-to-life prison term for defendant is undoubtedly stiff punishment. But the trial court's conclusion that an indeterminate Three Strikes law sentence was not outside the spirit of the Three Strikes sentencing scheme was not an abuse of the court's discretion.

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<sup>4</sup> In two paragraphs of his reply brief, defendant also asserts the denial of his *Romero* motion results in a constitutionally invalid cruel or unusual sentence. The argument is waived both because it was not presented in the opening brief and because it is insufficiently presented even in reply. (See, e.g., *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9; see also *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092-1093; *In re DeBeque* (1989) 212 Cal.App.3d 241, 254-255.)

## B

When the trial court resentenced defendant, imposition of a section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) However, recent legislation that took effect on January 1, 2019, deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (and related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

Defendant and the Attorney General agree that the change in law worked by Senate Bill 1393 applies retroactively to defendant under the principles espoused in *In re Estrada* (1965) 63 Cal.2d 740. Both parties further agree that a remand to the trial court is appropriate in this case so the trial court will have the opportunity to consider striking one or both of the prior serious felony conviction enhancements that were previously imposed as then required by law. We concur. A remand is appropriate because the record provides no “clear indication” that the trial court would decline to exercise the recently conferred discretion to reduce defendant’s sentence. (Cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 423.)

## DISPOSITION

The cause is remanded for the trial court to consider whether it wishes to exercise its discretion to strike, under section 1385, one or both of defendant's section 667, subdivision (a)(1) enhancements. In all other respects, the judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

JASKOL, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.